RECORD AND BRIEF

Supreme Court, U.S.
FILED
DEC 20 2016
OFFICE OF THE CLERK

No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

REPLY BRIEF FOR PETITIONER

RUTH GREENBERG
Law Office of Ruth Greenberg
450B Paradise Road
Number 166
Swampscott, MA 01907
(781) 632-5959

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
mkimberly@mayerbrown.com

Counsel for Petitioner

Library of Congress
Law Library

TABLE OF CONTENTS

Table of Authorities ii
Reply Brief for Petitioner 1
A. Only this Court can restore uniformity on the question presented 1
B. The question is cleanly presented 7
C. The decision below is wrong 10
Conclusion 10

TABLE OF AUTHORITIES

Cases

Addai v. *Schmalenberger*,
776 F.3d 528 (8th Cir. 2015) 3

Ambrose v. *Booker*,
684 F.3d 638 (6th Cir. 2012) 6

Bell v. *Jarvis*,
236 F.3d 149 (4th Cir. 2000) (en banc) 4

Charboneau v. *United States*,
702 F.3d 1132 (8th Cir. 2013) 4

Commonwealth v. *LaChance*,
17 N.E.3d 1101 (Mass. 2014) 5, 7, 8

Commonwealth v. *Marinho*,
981 N.E.2d 648 (Mass. 2013) 9

Commonwealth v. *Rainwater*,
681 N.E.2d 1218 (Mass. 1997) 9

Cooper Indus. v. *Aviall Servs., Inc.*,
543 U.S. 157 (2004) 10

Fitzgerald v. *Barnstable Sch. Comm.*,
129 S. Ct. 788 (2009) 9

Johnson v. *Sherry*,
586 F.3d 439 (6th Cir. 2009) 6

Littlejohn v. *United States*,
73 A.3d 1034 (D.C. 2013) 2

McGurk v. *Stenberg*,
163 F.3d 470 (8th Cir. 1998) 3, 4

Miller v. *Dormire*,
310 F.3d 600 (8th Cir. 2002) 3

Cases—continued

Neder v. *United States*,
527 U.S. 1 (1999) 5

Owens v. *United States*,
483 F.3d 48 (1st Cir. 2007) 2

Padilla v. *Kentucky*,
559 U.S. 356 (2010) 9

Premo v. *Moore*,
562 U.S. 115 (2011) 10

State v. *Cabrera*,
2015 WL 3878287 (Del. Super. Ct. 2015) 5

State v. *Lamere*,
112 P.3d 1005 (Mont. 2005) 6

State v. *Sessions*,
342 P.3d 738 (Utah 2014) 5

Strickland v. *Washington*,
466 U.S. 668 (1984) ..... *passim*

Texas v. *Cobb*,
532 U.S. 162 (2001) 9

United States v. *Gonzalez-Lopez*,
548 U.S. 140 (2006) 10

United States v. *Kehoe*,
712 F.3d 1251 (8th Cir. 2013) 4, 5

Winston v. *Boatwright*,
649 F.3d 618 (7th Cir. 2011) 4, 5

Statutes

28 U.S.C. § 2254 3

REPLY BRIEF FOR PETITIONER

Respondent candidly acknowledges the "division" and "disagreement" among the lower courts (Opp. 9) over the question whether prejudice must be presumed when ineffective assistance of counsel results in a structural error. Respondent does not disagree that the question presented in the petition is exceptionally important. And respondent does not dispute *amici*'s demonstration that resolution of the question presented would shed much-needed light on the question of how federal and state courts should approach unpreserved structural errors in a wide range of other procedural contexts.

Respondent instead resists certiorari on two grounds. *First*, it says (Opp. 9-22) that the conflict is not as deep as the petition makes it out to be and suggests (Opp. 15) that the conflict therefore "can be left to the lower courts to correct." *Second*, respondent asserts (Opp. 25) that the Massachusetts courts might yet "find that Petitioner has not shown deficient performance in the *Strickland* sense."

Neither assertion has any merit. The petition for a writ of certiorari should be granted.

A. Only this Court can restore uniformity on the question presented

We showed in the petition (at 10-18) that the lower courts are deeply divided on the question whether prejudice should be presumed when ineffective assistance results in a structural error. Respondent acknowledges the "disagreement in the lower courts" (Opp. 9) but insists that "the division is not so pronounced" as we demonstrated in the petition (*ibid.*) and that the conflict can be "corrected through the refinement of decisions in the lower courts" (Opp. 22).

Respondent is wrong. The question presented implicates a mature and acknowledged split that has persisted for well more than a decade despite repeated opportunities for the courts to consider the reasoning of their peers. Only this Court can resolve the intractable disagreement among the lower courts.

1. Respondent does not disagree that both *Owens* v. *United States*, 483 F.3d 48 (1st Cir. 2007), and *Littlejohn* v. *United States*, 73 A.3d 1034 (D.C. 2013), squarely conflict with the decision below on the question presented. See Opp. 17. Nor could it. In each of those cases, the court held that a defendant who had demonstrated deficient performance was not required to establish actual prejudice under *Strickland* because the consequence of the deficiency was a structural error. See *Owens*, 483 F.3d at 64-65 & n.13; *Littlejohn*, 73 A.3d at 1043-1044.

Respondent describes both cases as "isolated" and asserts that "these courts can correct themselves." Opp. 17. That is mistaken. The court in *Littlejohn* recognized the split, considered the reasoning of the courts on the opposite side of the issue, and disagreed with those courts nonetheless. See 73 A.3d at 1043 ("we do not agree with the Eleventh Circuit"). There is no reason to think the District of Columbia Court of Appeals would change its mind now.

As for *Owens*, that case has been cited over 340 times in courts throughout the country, including over 200 times in the district courts within the First Circuit and over 20 times by the First Circuit itself. In all that time, the First Circuit has not once signaled any reluctance to adhere to its holding. There is, in short, no reason to think that the First Circuit would reverse course, either.

2. Respondent does not deny that the Eighth Circuit's decision in *McGurk* v. *Stenberg*, 163 F.3d 470 (8th Cir. 1998), also conflicts with the decision below. It asserts, instead, that *McGurk* was wrongly decided and that the Eighth Circuit has "begun to rectify its own mistake" by "narrowly confin[ing] *McGurk*." Opp. 15. Not so.

Quite apart from "narrowly confin[ing]" *McGurk*'s holding (Opp. 15), the Eighth Circuit's decision in *Addai* v. *Schmalenberger*, 776 F.3d 528 (8th Cir. 2015), expressly confirmed that *McGurk* remains binding circuit law: "under this court's precedent, 'when counsel's deficient performance causes a structural error, we will presume prejudice under *Strickland*.'" *Id.* at 535 (quoting *McGurk*, 163 F.3d at 475). The Eighth Circuit denied relief in *Addai* only because the petitioner in that case (a state-court defendant proceeding under 28 U.S.C. § 2254) had "failed to demonstrate clearly established federal law" precisely *because* the lower courts "have taken somewhat varying approaches" to the question that we presented in the petition here. *Ibid.* We made this point in the petition (at 14 n.3), but respondent ignores it.[1]

Respondent says (Opp. 16) that *Addai* described other cases as "in tension" with *McGurk*. It did nothing of the sort. In fact, *Addai* approvingly cited *Miller* v. *Dormire*, 310 F.3d 600 (8th Cir. 2002), in which the Eighth Circuit affirmed the district court's grant of habeas corpus relief in light of *McGurk*: "this circuit has determined that * * * *Strickland* prejudice is presumed" when ineffective assistance of counsel "is

---

[1] While the court in *Addai* admonished that *the petitioner* in that case "may be reading *McGurk* too broadly" (776 F.3d at 535), it did not call the correctness of *McGurk*'s holding into question.

tantamount to a structural error." *Id.* at 603 (citing *McGurk*). There is thus little reason to think that the Eighth Circuit is backing away from *McGurk*.[2]

3. Respondent contends the that remaining three cases that we cited in the petition are not in conflict at all with the Supreme Judicial Court's decision in this case. See Opp. 17-22. Even if that were correct, it would not overcome respondent's concession that the lower courts are divided. Thus, further review is warranted no matter the state of the law in these other jurisdictions. But even on its own terms, respondent's attempt to diminish the conflict is unpersuasive.[3]

Take first the Seventh Circuit's decision in *Winston* v. *Boatwright*, 649 F.3d 618 (7th Cir. 2011). Respondent says that *Winston* is distinguishable be-

---

[2] The decisions in *Charboneau* v. *United States*, 702 F.3d 1132 (8th Cir. 2013), and *United States* v. *Kehoe*, 712 F.3d 1251 (8th Cir. 2013), do not suggest otherwise. *Charboneau* involved a claim challenging the assistance of appellate counsel whose deficient performance did not, according to the court, result directly in a structural error. 702 F.3d at 1138. And *Kehoe*, which relied on pre-*McGurk* precedents, was limited by it terms to *Batson* errors. 712 F.3d at 1253. Although we submit that *Kehoe* was wrongly decided, its holding does not call into question the *McGurk* or its continuing applicability to non-*Batson* cases like this one.

[3] We have since uncovered an additional case from the Fourth Circuit resolving the question presented in petitioner's favor. See *Bell* v. *Jarvis*, 236 F.3d 149, 165 (4th Cir. 2000) (en banc) (citing *McGurk* favorably for the proposition that "the prejudice component of the *Strickland* analysis may be presumed if the nature of the deficient performance is that of a structural error"). Indeed, even the dissenting judges in *Bell* expressed their view that "the majority properly recognizes [that when] deficient performance constitutes structural error 'the prejudice component of the *Strickland* analysis may be presumed'"). *Id.* at 180 (Motz., J., dissenting).

cause it involved a *Batson* error and is "best read as recognizing a new category of cases in which prejudice is so likely that it can be presumed under *Strickland* and *Cronic*." Opp. 20.

That ignores what the court said. In analyzing the question presented, the Seventh Circuit catalogued a range of structural errors (including denial of counsel, provision of conflicted counsel, and denial of counsel of choice) and held in plain terms that "[u]nconstitutional juror strikes, *like other structural errors*, create the kind of problem that '*def[ies] analysis by harmless error standards.*'" 649 F.3d at 633 (emphasis added) (quoting *Neder* v. *United States*, 527 U.S. 1, 7 (1999)). It was for that reason—the impossibility of evaluating harmlessness—that the Seventh Circuit held that prejudice must be presumed when ineffective assistance results in a structural error, regardless of the precise nature of the error. There is thus every reason to believe that petitioner would have received a new trial if his claim had arisen in the Seventh Circuit.[4]

---

[4] Respondent claims—puzzlingly—that it "has uncovered no decision" citing *Winston* for its resolution of the question presented. Opp. 20-21. But in *LaChance*, the Supreme Judicial Court itself cited *Winston* for the proposition that prejudice is "presumed * * * on a claim of ineffective assistance of counsel predicated on counsel's failure to raise structural error at trial." *Commonwealth* v. *LaChance*, 17 N.E.3d 1101, 1111 n.9 (Mass. 2014). There are many other such cases, including some cited by respondent elsewhere in its opposition. See, *e.g.*, *United States* v. *Kehoe*, 712 F.3d 1251, 1255 n.4 (8th Cir. 2013) (citing *Winston* for the proposition that "prejudice is presumed for purposes of *Strickland*" when deficient performance results in structural error). See also, *e.g.*, *State* v. *Sessions*, 342 P.3d 738, 746 (Utah 2014) (citing *Winston* as "chief among" the decisions standing for the "presumed prejudice" rule); *State* v. *Cabrera*, 2015 WL 3878287, at *19 (Del. Super. Ct. 2015) (similar).

Concerning the Montana Supreme Court's decision in *State* v. *Lamere*, 112 P.3d 1005 (Mont. 2005), respondent says that the court there was concerned only with state law, and not federal law. Opp. 21. That once again ignores what the court said. With respect to its holding that "constructive denial of the assistance of counsel is presumed to result in prejudice," *Lamere* (like *LaChance*) was unmistakably construing "the second prong of the *Strickland* test" under the federal "Sixth Amendment." 112 P.3d at 1012, 1013. To say otherwise simply denies reality.

Finally, respondent says that the Sixth Circuit's decision in *Johnson* v. *Sherry*, 586 F.3d 439 (6th Cir. 2009), did not establish a categorical rule because the court said only that there was a "strong likelihood" that prejudice would be presumed on remand in that case. Opp. 18-19. But the better reading of that statement is that the court meant that it was likely (but not certain) that the petitioner would prevail on the *first* prong of the *Strickland* inquiry, thus triggering the presumption of prejudice under the second prong. That is evidently how Judge Kethledge read the majority opinion when he stated in his dissent that "[o]ur decision today directly conflicts with [the Eleventh Circuit's] decision [in *Purvis*]." 586 F.3d at 449.[5]

---

[5] Pointing to *Ambrose* v. *Booker*, 684 F.3d 638, 651 (6th Cir. 2012), respondent asserts (Opp. 18) that the Sixth Circuit has "confirmed" the "limited reach" of *Johnson*. Although certain aspects of *Ambrose* are in tension with the reasoning in *Johnson*, the two cases are distinguishable: Whereas *Johnson* is an ineffective assistance case, *Ambrose* is a procedural default case. See *Ambrose*, 684 F.3d at 651. As the amici supporting the petition aptly explain (Amici Br. 10-11), the lower courts are separately conflicted on the question whether to presume prejudice in procedural default cases like *Ambrose*. Review of the question presented here would likely help clear up that confusion.

In sum, there is no denying that the lower courts are deeply divided over the question presented; respondent's suggestion that the conflict might resolve itself simply doesn't hold up. Further review is therefore warranted.

B. The question is cleanly presented

1. We demonstrated in the petition (at 20-23) that this case is an impeccable vehicle for addressing the question presented. The trial court concluded that petitioner's Sixth Amendment right to a pubic trial was violated, resulting in a structural error. Pet. App. 55a-60a. It held further that counsel's failure to object to the courtroom closure "was not the product of tactical consideration" but instead was "the product of 'serious incompetency, inefficiency, or inattention' to [petitioner]'s Sixth Amendment right to a public trial, and was not objectively reasonable." Pet. App. 62a-63a. It still denied relief, but only because petitioner "has not offered any evidence or legal argument establishing prejudice." *Id.* at 64a.

After explaining that "[a] violation of the Sixth Amendment right to a pubic trial constitutes structural error," the Supreme Judicial Court held that the trial court had "correctly determined that counsel's inaction was the product of 'serious incompetency, inefficiency, or inattention to [petitioner]'s Sixth Amendment right to a public trial, and was not objectively reasonable.'" Pet. App. 39a-40a (emphasis omitted). It thus affirmed the trial court's denial of relief based exclusively upon "the rule announced in *LaChance*" because petitioner had "failed to show that trial counsel's conduct caused prejudice." *Ibid.*

Beyond all of that, petitioner has consistently litigated his ineffective assistance claim as a matter of

federal law. See Petr. SJC Br. 39-47 (arguing that petitioner was "deprived of his federal * * * right to * * * effective assistance of counsel" and that *LaChance* should not make him "ineligible for federal relief"). And the lower court resolved the question presented in the petition by applying *LaChance*, which was unmistakably a *Strickland* case. Pet. App. 40a.

2. Respondent nevertheless asserts that this case may not be a suitable vehicle because the Supreme Judicial Court "*seems* to have applied" the state standard to the performance prong of the ineffective assistance inquiry (Opp. 9 (emphasis added)) and "did not *clearly* indicate that it found [petitioner's] counsel deficient under the federal standard" (Opp. 22 (emphasis added)). It thus speculates that there "is no guarantee that the [court below] would find [p]etitioner's counsel to have performed deficiently under the more demanding federal ineffectiveness standard" on remand. Opp. 26.

Respondent's speculation does not diminish the suitability of this case for further review, for three reasons.

First, the lower courts' deficient-performance analysis followed the *Strickland* test precisely. To establish deficient performance under *Strickland*, a defendant must show that his lawyer's conduct was not "the result of reasonable professional judgment" and fell "outside the wide range of professionally competent assistance." *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984). That is just what the trial court held and what the court below affirmed: Petitioner's lawyer's failure to object to the closure "was not the product of tactical consideration" and thus fell short of "objectively reasonable" professional judgment. Pet. App. 40a, 62a-63a. There is, therefore, no reason to think

that the lower court meant to leave open the question whether petitioner's trial counsel was constitutionally deficient "in the *Strickland* sense" (Opp. 25).

Second, to the extent Massachusetts law of ineffective assistance is in some respects "more favorable" to defendants (Opp. 23), it is for reasons unrelated to the performance prong of the test. For example, the Massachusetts courts recognize a right to counsel in broader circumstances than does this Court. See, *e.g.*, *Commonwealth* v. *Rainwater*, 681 N.E.2d 1218, 1227 (Mass. 1997), abrogated on unrelated grounds by *Texas* v. *Cobb*, 532 U.S. 162 (2001). Thus there is no reason to think that the SJC would evaluate attorney performance, in particular, differently under state and federal standards in any event.[6]

Finally, even if we were wrong about the first two points, respondent's speculation still would not provide a basis for denying review. When subsequent issues remain unaddressed., the ordinary course is for the Court to resolve the question presented in the petition and, if petitioner prevails, to remand for "full consideration by the courts below" of the remaining issues. *Cooper Indus.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004. If (contrary to fact) the federal performance question really had gone unaddressed, that would be the proper outcome here.

---

[6] Regardless, there is no merit to respondent's suggestion that trial counsel was not deficient. Opp. 25-26. On this point, respondent does not dispute any of the lower courts' factual findings; rather, it cites *other* cases in which the courts found adequate performance. But those are different cases with different lawyers facing different facts. They have no bearing here.

C. The decision below is wrong

In addressing the circuit split, respondent argues that the cases that have adopted the no-presumption rule are "in harmony" with this Court's precedents. Opp. 10. It does so unpersuasively.

Respondent contends, in the main, that proof of prejudice under *Strickland* is indispensable because prejudice is an element of the constitutional violation itself; without an independent demonstration of prejudice, it reasons, deficient performance does not mature into a constitutional violation at all. See Opp. 11-12 (citing, *e.g.*, *Premo* v. *Moore*, 562 U.S. 115, 128 (2011) ("The *Fulminante* prejudice inquiry presumes a constitutional violation, whereas *Strickland* seeks to define one.")).

That argument, and the cases respondent cites to support it, do not speak to the circumstances implicated by the question presented in the petition. In cases like this one, it is the separate and distinct constitutional violation *resulting from* the deficient performance that "necessarily render[s] [the] criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 158 (2006) (emphasis omitted). The question here is whether the presumptive prejudice flowing from that distinct structural violation should be understood as *also* satisfying the second prong of the *Strickland* test. The cases cited by respondent at pages 11 through 12 of the opposition do not address that question.

CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant certiorari.

Respectfully submitted.

RUTH GREENBERG
Law Office of
Ruth Greenberg
450B Paradise Road
Number 166
Swampscott, MA 01907
(781) 632-5959

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3127
mkimberly@mayerbrown.com

Counsel for Petitioner

December 2016